

**Galloway School Lines, Inc. and Local 76, Service Employees' International Union, AFL-CIO.**  
Cases 1-CA-26744(E) and 1-RC-19303

October 31, 1994

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND DEVANEY

On October 29, 1993, Administrative Law Judge Robert T. Wallace issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief and the Applicant filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

On July 28, 1992, the Board issued its decision in the underlying consolidated unfair labor practice/representation case,<sup>1</sup> adopting the judge's recommendation to dismiss the complaint allegations in their entirety, to overrule the Petitioner Union's objections, and to certify the results of the election. Thereafter, the Applicant, the Respondent below, filed an application for an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA) and Section 102.143 of the Board's Rules and Regulations. In the instant supplemental decision, the judge found neither substantial justification for the General Counsel to have pursued the complaint nor special circumstances precluding an award of fees and expenses to the Applicant. Accordingly, he granted the Applicant's application and awarded it the amount of \$37,871. The General Counsel disputes the judge's characterization of his position in the underlying unfair labor practice case as "not substantially justified," and asserts that its prosecution of the complaint was reasonable and well founded. We find merit in the General Counsel's contentions and, for the reasons stated below, reverse the judge's findings and deny the application.

EAJA, as applied through Section 102.143 of the Board's Rules and Regulations, provides that a "respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding" and who meets certain eligibility requirements relating to net worth, corporate organization, number of employees, etc., is eligible to seek reimbursement for certain expenses incurred in connection with that proceeding. Section

102.144 states that a reimbursement of such expenses will be awarded "unless the position of the General Counsel over which the party has prevailed was substantially justified." To meet this burden, the General Counsel must establish that he was substantially justified at each stage of the proceeding, i.e., at the time of the issuance of the complaint, taking the matter through hearing, and in filing exceptions to the judge's decision. An examination of the circumstances and evidence available to the General Counsel at these junctures is required in order to determine whether the General Counsel has carried his burden.

In order to determine whether the General Counsel has satisfied this test, it is necessary first to identify what constitutes substantial justification. The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits,<sup>2</sup> and that it is not intended to deter the agency from bringing forward close questions or new theories of the law.<sup>3</sup> The Supreme Court has defined the phrase "substantial justification" under EAJA as "justified to a degree that could satisfy a reasonable person" or having a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, in weighing the unique circumstances of each case, a standard of reasonableness will apply.

In this case, the judge's analysis of the Applicant's EAJA claim is as follows:

The central and undisputed fact of this case is that the three alleged discriminatees (DelBene, Brown-ing and Hanson) chose to quit their jobs as school bus drivers on short notice at the beginning of a new school year, each offering "family" or "child care" as reasons for their decision. There is no allegation or proof that their resignations were other than voluntary.

The judge then reiterated his findings from the underlying decision that there was a "paucity of evidence that [the Applicant] knew and/or harbored animus toward [the alleged discriminatees]" because of "their minimal involvement in the organizational drive," and determined that the alleged discriminatees' own conduct led to their fate with the Applicant. Thus, the judge concluded the General Counsel was not substantially justified in its prosecution of the case.

We disagree. As explained below, the judge's analysis glosses over two essential points. First, his conclusion that there was a "paucity of evidence" showing knowledge of, and animus toward, the alleged discriminatees' union activities reflects his credibility determinations concerning conflicting trial testimony in the underlying case. Second, his conclusion that the al-

<sup>1</sup> 308 NLRB 33.

<sup>2</sup> *Jim's Big M*, 266 NLRB 665 (1983).

<sup>3</sup> *Laborers Funds of Northern California*, 302 NLRB 1031 (1991); *Craig & Hamilton Meat Co.*, 276 NLRB 974 (1985).

leged discriminatees' resignations were voluntary and unaffected by any lawful actions on the part of the Respondent rested on inferences from evidence that could reasonably have supported contrary inferences. These points are critical to the decision regarding substantial justification for the General Counsel's position, since in issuing complaint and proceeding through the trial, the General Counsel was acting without benefit of the judge's ultimate credibility resolutions and choices among possible inferences.

At the time the General Counsel issued complaint, the following was clear: there had been an organizing campaign at the Applicant's facility; during the critical period the Applicant's president and its attorney had made statements that could be interpreted as threats of reprisal against union supporters and of the futility of their efforts; and three employees whose pronoun sentiments could reasonably have been known by the Applicant were no longer employed as a result of possible disparate treatment. At that point, the General Counsel was looking at a situation which, if his witnesses were credited, would establish efforts at coercion, antiunion animus, knowledge of union activities, and retaliatory discrimination against pronoun employees. Thus, the complaint alleged that the Applicant revealed union antagonism through its own words and that DelBene, Browning, and Hanson each suffered discrimination because of their union support.

During the hearing, the judge's own findings of fact establish that: (1) the Rhode Island Department of Employment Security determined on appeal that DelBene was caused to lose state unemployment benefits prematurely<sup>4</sup> and was thereafter denied the opportunity to work as a spare driver; (2) Browning was denied her request to have another driver "cover" part of her scheduled run—an accommodation which had been extended to other employees—which resulted in her leaving her position, and she was thereafter denied the opportunity to work as a spare driver; and (3) Hanson was taken off one route and reassigned to one she found less desirable, which resulted in her leaving her job. It is further undisputed that each of these employees had attended a union organizational meeting where they signed authorization cards and, during which, an antiunion employee, Czerkiewicz, attempted to debate the merits of unionization and took notes of what transpired. It is also established that Czerkiewicz discussed that meeting with Area Manager DeSouza, the alleged discriminatees' supervisor. The findings of fact also disclose that Browning's name appeared on a widely disseminated list identifying members of the organizing committee, that she displayed a union button on her purse, and that she was open in expressing her pronoun sentiments. It is further undisputed that Han-

son's picture appeared in a union leaflet which identified her as a supporter, and the judge found that it could be assumed that this leaflet was seen by the Respondent.

Despite this evidence, the judge nevertheless credited testimony from DeSouza and Czerkiewicz that the alleged discriminatees' attendance at the organizational meeting was not discussed. Neither did he infer that the Applicant otherwise became aware of these individuals' preferences either directly or through union literature. In addition, he concluded that the Applicant was under no obligation to accommodate employees' scheduling preferences, and that business reasons justified its not having reemployed any of the three. Further, the judge credited the denial of the Applicant's president that he had stated he would never recognize the Union, and the judge construed certain statements alleged as coercive as being innocuous, i.e., that a reference to "loyalty" had meaning beyond a union/company context and that a reference to possible job loss related to safety rather than union reasons. In short, it was the judge's credibility findings and inferences from the evidence—not undisputed evidence—that led to his dismissing the complaint. Resolving credibility, after hearing and observing all the witnesses and weighing the evidence in light of those findings, is precisely within the judge's purview, not that of the General Counsel. The General Counsel's role is to proceed to hearing on a reasonable foundation that a violation of the Act has occurred. That is what the General Counsel did in this instance. It should also be noted that once the judge's credibility centered decision was rendered, the General Counsel did not file exceptions. This demonstrates the General Counsel's understanding that once the factual parameters had reasonably been drawn in a manner contrary to its theory of violation, and, lacking a reasonable basis for disputing the judge's resolution, he lacked substantial justification to proceed further.<sup>5</sup>

<sup>5</sup> The judge also specifically rejected the General Counsel's contention that because he filed no exceptions to the initial decision, liability for costs incurred subsequent to that time should be disallowed. He noted that because the General Counsel did not also move to dismiss the complaint, the door remained open for the Union to file exceptions, thereby eliciting the Applicant's reply and attendant expenses. Whatever the merits of the judge's view that the General Counsel should attempt to block efforts of a charging party to except to dismissals of allegations based on its charges, we note that here there likely would have been further proceedings in any event in the related representation case to which the General Counsel was not a party.

As indicated above, the Petitioner Union had filed objections to the conduct of the election which were consolidated for hearing with the complaint. Notably, the objections were identical in substance to the alleged unfair labor practices. It should be noted further that the Petitioner Union's exceptions to the underlying decision related solely to alleged 8(a)(1) critical period conduct (which paralleled its objections) and that the Union was seeking, through its exceptions, to have the results of the election set aside. Inasmuch as the exceptions

<sup>4</sup> The unemployment benefits issue is described in the underlying decision, 308 NLRB at 36.

Thus, we find that because the issues of this case could not reasonably have been resolved short of a hearing during which the credibility of witnesses could be assessed, the General Counsel's position was substantially justified throughout this proceeding. Accordingly, we will dismiss the application.

### ORDER

The National Labor Relations Board reverses the recommended Order of the administrative law judge and orders that the application of the Applicant, Galloway School Lines, Inc., Chariho, Rhode Island, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

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were thus grounded in a representation matter, and because EAJA does not extend to representation cases, no award of expenses would have been warranted for that aspect of the proceeding in any event. *K & I Transfer & Storage*, 277 NLRB 1063 fn. 2 (1985).

*Thomas J. Morrison, Esq.*, for the General Counsel.

*Thomas J. McAndrew and Patricia E. Andrews, Esqs.*, for the Respondent.

*Burton E. Rosenthal, Esq. (Segal, Roitman & Coleman)*, of Boston, Massachusetts, for the Charging Union.

### SUPPLEMENTAL DECISION

#### [Equal Access to Justice Act]

ROBERT T. WALLACE, Administrative Law Judge. In my earlier decision I dismissed the complaint in its entirety, overruled all objections, and certified that the Union had lost the election. The Union, but not the General Counsel, filed exceptions. On July 28, 1992, the Board (308 NLRB 33) affirmed the decision.

The prevailing party (Galloway), on August 27, 1992, filed an application (pursuant to the Equal Access to Justice Act—Pub. L. 96-481, 94 Stat. 2325 and Section 102.143 of the Board's Rules and Regulations) for an award of fees and expenses incurred in its successful defense. On October 20, the General Counsel filed a motion to dismiss; and Galloway replied. I denied the motion by order dated February 16, 1993, whereupon the General Counsel, on May 12 opted to file the answer here considered.

The EAJA provides for the award of attorney's fees and other expenses to eligible parties who prevail in litigation before administrative agencies, unless the Government can establish that its position in the litigation was substantially justified or that special circumstances make an award unjust. EAJA, Section 504(a). Congress characterized the "substantially justified" standard as one of reasonableness:

The test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be made.

Congress emphasized that no adverse inferences were to be drawn from the fact that the Government did not prevail in the adversary litigation:

The standard, however, should not be read to raise a presumption that the government position was not substantially justified simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial probability of prevailing.

As to "special circumstances" which make an award unjust, the committee report explains:

This "safety valve" helps to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

On review of the record in this proceeding, I find no substantial justification for the complaint and no circumstances precluding an award.

The central and undisputed fact of this case is that the three alleged discriminatees (Browning, DelBene, and Hanson) chose to quit their jobs as schoolbus drivers on short notice at the beginning of a new school year, each offering "family" or "child care" as reasons for their decision. There is no allegation or proof that their resignations were other than voluntary.

Instead, bus operator Galloway is cited for having changed Hanson's route assignment and for not recalling DelBene and Browning as "spares," allegedly because they supported unionization. Hanson, however, admittedly did not even mention, let alone complain, contemporaneously to the Company about the route change; and, in light of their failure to give adequate notice and a sharply diminished number of bus assignments available, Galloway appears to have had ample justification for not using DelBene and Browning as spares. Further, and as found in the initial decision, the three drivers had minimal involvement in the organizational drive; and there was a paucity of evidence that Galloway knew and/or harbored animus toward them because of it. Indeed, in an effort to dissuade Browning from leaving, her supervisor provided the names of several babysitters, conduct hardly consistent with any effort to punish union activism.

Applicant has provided a detailed breakdown of its fees and expenses, which I find accurate,<sup>1</sup> reasonable, and in accord with Section 102.143 et seq. of the Board's Rules and Regulations. The General Counsel's contention that costs incurred subsequent to the initial decision should be disallowed because he chose not to file exceptions is without merit. By not also moving to dismiss, the complaint remained viable and enabled the Union to file exceptions which, in turn, elicited applicant's reply.

Accordingly, I find applicant Galloway entitled to reimbursement of \$37,297.25 for fees and expenses incurred in defending this case.

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<sup>1</sup>Through admitted inadvertence, the application contains a claim for 8.5 hours' work on matters not related to this case. In consequence, the total claim is reduced by \$637.50.